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Mustafa bin Tasaduk & Ors v Kerajaan Malaysia

B HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO WA-12BNCC-43–12 OF 2018
DARRYL GOON J
10 JUNE 2019

C *Civil Procedure — Documents — Bundle of documents — Part B documents — Whether ledger part of agreed bundle of documents existence of which were not disputed but contents not admitted — Whether existence of ledger could be disputed — Evidential burden on appellants to demonstrate contents of ledger wrong and inaccurate — Whether appellants led evidence or pleaded facts to contrary of amount stated in ledger*

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Limitation — Accrual of cause of action — Fresh accrual of cause of action — Whether there was acknowledgement of debt by appellants — Whether there was fresh accrual of cause of action — Limitation Act 1953 s 26(2)

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This was an appeal against the decision of the learned sessions court judge in allowing the respondent's claim against the appellants. The claim was in respect of an educational loan granted to the first appellant by the respondent whereby the second and third defendants were the guarantors of the first appellant's loan. It was agreed in the loan agreement that the respondent would give the first appellant a loan amounting to the sum of RM180,000 and that the first appellant was obliged to repay the sum loaned by way of instalment payments upon him finishing his studies. The actual amount loaned was said to be a sum of RM138,388.81. The appellant had since only repaid an amount of RM35,288 to which RM103,100.81 was still due and owing. The appellant contended that: (a) there was a breach of promise or representation by the respondent that the loan would be converted to a scholarship; (b) the first appellant was informed by an officer of the respondent to make one special payment of RM30,000 as a final payment to enable consideration of his education loan to be converted to a scholarship; (c) the respondent's claim was statute barred by the Limitation Act 1953 ('the LA') and the payment of RM30,000 by the first appellant was neither an acknowledgement of the respondent's claim nor a payment in respect thereof, as required under s 26(2) of the LA for there to be a fresh accrual of the respondent's right of action; and (d) the sum claimed was not proven by the respondent because what was led in evidence was merely a ledger with entries of amounts paid and the amount allegedly due and owing and the witness who testified in regard to the ledger had no personal knowledge of its content.

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Held, dismissing the appeals with costs:

(1) The ledger in question was part of an agreed bundle of documents the existence of which were not disputed but their contents were not admitted, commonly known as 'Part B' documents. The existence of the ledger could not now be disputed by the appellants. What was not admitted were its contents. Although the contents of the ledger were not admitted, the ledger itself, including its contents were nevertheless, by consent, adduced and admitted into evidence at the trial. There was evidence of the amount owed as stated in the ledger. The evidential burden, as opposed to the legal burden, to demonstrate that the contents of the ledger were wrong or inaccurate thus shifted to the appellants. However, no evidence was led, or facts pleaded, to the contrary of what was claimed to be the amount owed, as stated in the ledger (see paras 26 & 29).

(2) The oral testimonies of the first appellant, the contents of the first appellant's undated letter and the payment of RM30,000 clearly pointed to the fact that the payment was towards repaying the educational loan. The circumstances in which these events occurred pointed to an unequivocal acknowledgement by the first appellant of his liability to repay the debt claimed. There could be no other probable purpose for the payment of RM30,000 if not towards the settlement of the debt owed to the respondent and there could be no other probable reason for the payment, if it was not an acknowledgement that the debt was owed by the respondent (see paras 49–50).

[Bahasa Malaysia summary

Ini merupakan rayuan atas keputusan hakim mahkamah sesyen yang terpelajar dalam membenarkan tuntutan responden terhadap perayu. Tuntutan ini berkenaan dengan pinjaman pendidikan yang diberikan kepada perayu pertama kepada responden yang mana defendan kedua dan ketiga merupakan *guarantor* kepada pinjaman perayu pertama. Ianya dipersetujui dalam perjanjian pinjaman bahawa responden akan memberikan perayu pertama pinjaman berjumlah RM180,000 dan bahawa perayu pertama dikehendaki untuk membayar jumlah yang dipinjamkan dengan cara bayaran berperingkat setelah dia selesai pengajiannya. Jumlah sebenar yang dipinjamkan dikatakan berjumlah RM138,388.81. perayu sejak daripada itu telah membayar semula sejumlah RM35,288 yang mana RM103,100.81 masih terhutang. Perayu menegaskan bahawa: (a) wujud pelanggaran janji atau representasi oleh responden bahawa pinjaman tersebut akan ditukarkan kepada satu biasiswa; (b) perayu pertama dimaklumkan oleh pegawai responden untuk membuat satu bayaran khas berjumlah RM30,000 sebagai bayaran terakhir untuk membenarkan pertimbangan pinjaman pendidikannya ditukarkan kepada satu biasiswa; (c) tuntutan responden dihalang oleh undang-undang oleh Akta Had Masa 1953 ('Akta tersebut') dan bayaran RM30,000 oleh perayu pertama

A bukanlah satu pengiktirafan tuntutan responden atau bayaran berkaitan dengannya dan diperlukan di bawah s 26(2) Akta tersebut untuk timbulnya hak untuk mengambil tindakan baru oleh responden; and (d) jumlah yang dituntut tidak dibuktikan oleh responden kerana apa yang dibuktikan dalam keterangan hanyalah satu lejar dengan kemasukkan jumlah yang dibayar dan
B jumlah yang kononnya terhutang dan saksi yang memberikan keterangan berkenaan dengan lejar tersebut tiada pengetahuan mengenai isi kandungannya.

Diputuskan, menolak rayuan dengan kos:

C (1) Lejar yang dipersoalkan merupakan sebahagian daripada ikatan dokumen yang dipersetujui dan kewujudnya tidak dinafikan tetapi isi kandungannya tidak diakui, secara lazimnya dikenali sebagai dokumen Bahagian B. Kewujudan lejar tersebut tidak boleh kini dinafikan oleh
D perayu. Apa yang tidak diakui adalah isi kandungannya. Walaupun isi kandungannya tidak diakui, lejar terebut, termasuk kandungannya adalah, dengan keizinan pihak-pihak, dikemukakan dan diterima sebagai keterangan sewaktu perbicaraan. Beban pembuktian, bertentangan dengan beban perundangan, untuk menunjukan bahawa kandungan
E lejar tersebut adalah salah atau tidak tepat berpindah kepada perayu. Namun, tiada keterangan dikemukakan, atau fakta diplidkan, bertentangan dengan apa yang dikatakan merupakan jumlah terhutang sepertimana yang dinyatakan dalam lejar (lihat perenggan 26 & 29).

(2) Keterangan lisan perayu pertama, isi kandungan surat tidak bertarikh
F perayu pertama dan pembayaran RM30,000 dengan jelas menunjuk kepada fakta yang mana bayaran dibuat terhadap membayar semula pinjaman pendidikan tersebut. Keadaan yang mana kejadian berlaku menunjuk kepada pengakuan tidak berbahagi perayu pertama terhadap liabilitinya untuk membayar hutang yang dituntut. Tiada tujuan lain
G untuk pembayaran RM30,000 sekiranya tidak untuk penyelesaian hutang kepada responden dan tiada sebab lain yang berkemungkinan untuk pembayaran, sekiranya ianya bukan pengakuan hutang yang terhutang oleh responden (lihat perenggan 49–50).]

H **Notes**

For a case on fresh accrual of cause of action, see 9 *Mallal's Digest* (5th Ed, 2018 Reissue) para 2334.

For cases on bundle of documents, see 2(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3580–3582.

I **Cases referred to**

Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals [2003] 1 MLJ 567; [2003] 1 CLJ 585, CA (refd)

Ekuiti Setegap Sdn Bhd v Plaza 393 Management Corp (established under The

Strata Titles Act 1985) [2018] 4 MLJ 284; [2019] 2 CLJ 592, CA (refd)
Kamdar Sdn Bhd v Bipinchandra a/l Balvantrai & Ors [2016] MLJU 974; [2017] 1 CLJ 369, CA (refd)
Randhir Singh a/l Bhajnik Singh v Sunildave Singh Parmar (the administrator of the estate of K Surjit Kaur a/p Gean Kartar Singh, deceased) [2018] 12 MLJ 166; [2018] 1 LNS 1374, CA (refd)
Sim Cheng Ho v Fum Boo Ju (P) & Anor [2018] MLJU 1760; [2018] 1 LNS 1824, CA (refd)
Surrendra Overseas Ltd v Government of Sri Lanka [1977] 2 All ER 481, QBD (refd)
Thomas v Thomas [1947] AC 484, HL (refd)
Yuill v Yuill [1945] P 15, CA (refd)

Legislation referred to

Limitation Act 1939 [UK] s 23(4)
Limitation Act 1953 ss 6, 26, 26(2)

Amarjeet Singh (Zubeda & Amarjeet) for the appellant.
Rebecca Helden (Pahang State Legal Advisor's Office) for the respondent.

Darryl Goon J:

[1] This was an appeal against the decision of the learned sessions court judge in allowing the respondent's claim against the appellants for a sum of RM103,100.81 together with interest thereon at the rate of 5%pa and costs of RM8,198.

[2] The respondent's claim was in respect of an educational loan granted to the first appellant by the respondent. The second and third appellants were the guarantors for the first appellant' loan.

BACKGROUND FACTS

[3] It was not disputed that the first appellant was granted an educational loan by the respondent to pursue a degree in Commerce at the University of New South Wales, Australia, for a period of 36 months.

[4] The educational loan agreement cum guarantee was entered into between the appellants and the respondent on 4 December 1996. Under this agreement the respondent agreed to grant a loan of RM180,000 to the first appellant and the first appellant was obliged to repay the sum loaned by way of instalment payments upon him finishing his studies. The actual amount loaned to the first appellant was said to be a sum of RM138,388.81.

[5] Upon completing his studies, the respondent sent the first appellant a letter dated 16 December 2002 with instructions for monthly payments to be made towards settling the loan.

[6] The instructions given were that the first appellant was to make monthly payments of RM437 for 316 months and a final payment of RM291.81.

[7] On 1 July 2011, the first appellant wrote to the respondent with a proposal for a discount on the re-payments he was required to make. This proposal was however rejected by the respondent by its letter dated 26 September 2011.

[8] According to the respondent, since then, the first appellant had only repaid an amount of RM35,288 leaving an amount of RM103,100.81 still due and owing.

[9] The last payment made by the first appellant was a sum of RM30,000. This payment was made by way of a CIMB banker's cheque dated 12 March 2012. A receipt for this payment dated 14 March 2012 was issued by the respondent. Both these documents were tendered in evidence.

THE APPELLANTS' CONTENTIONS

[10] It was part of the appellants' defence that there was a breach of a promise or representation by the respondent to the first appellant that the first appellant's education loan would be converted to a scholarship.

[11] The appellants further alleged that subsequently, the first appellant was informed by an officer of the respondent to make one special payment of RM30,000 as a final payment to enable consideration of his education loan to be converted to a scholarship. This was pleaded in the appellants' defence.

[12] The appellants also contended that the respondent's claim was statute barred by reason of the provisions in the Limitation Act 1953. It was maintained that the breach on the first appellant's part was in May of 2006. Therefore, the six year limitation period set for a claim under contract had expired in May of 2012. The action herein, which was only issued on 7 March 2018, was therefore well beyond the statutory limitation period set under s 6 of the Limitation Act 1953.

[13] Quite apart from the specific defences raised, the appellants contended that the sum claimed of RM103,100.81 was not proven by the respondent. This was because what was led in evidence was merely a ledger with entries of

amounts paid and the amount allegedly due and owing. The appellants also maintained that the witness who testified in regard to the ledger, SP2, did not have any personal knowledge of its content. As such, it was submitted that the amount claimed was not proven.

THE APPELLANTS' APPEAL

[14] As for the alleged breach of a promise or representation by the respondent that his education loan would be converted to a scholarship, the learned sessions court judge found that this was not proven. It was found that this contention was merely a bare allegation and not supported by any evidence.

[15] In fact, cl 1(f) of the loan agreement dated 4 December 1996 made it clear that if there was to be any reduction in the payments to be made by the first appellant, this would be entirely at the discretion of the respondent. Clause 1(f) states as follows:

> (f) bahawa dia akan membayar balik semua pinjaman atau satu jumlah yang kurang daripada itu yang detetapkan atas budibicara KERAJAAN secara mutlak kepada KERAJAAN menurut cara yang terkandung kemudian daripada ini.

[16] Under cross-examination, the first appellant testified as follows:

> Upon completing in December 1999, we were visited by the consulate officer when we got our results and he congratulated us on our results and *said that our results most likely will give us a full scholarship, but obviously we would have to report to JPA back in KL* and then we were given the ticket to come back to Malaysia in early January. And as we returned to KL in January, we submitted our academic transcript to the KL office. We met the officer in charge and we, *I submitted my academic transcript to them and they said that they would revert to us with the decision and I followed up and when I followed up the decisions was not made and we later got loan repayment of RM80,000, which we were told to pay instalments.* And when I spoke to the officer, I said that initially when we submitted you said that we'll get a full scholarship or if not at least 75% and we were not given any formal letter saying that what were we entitled to and I also stated that the university I attended to the top university in Australia and I should be so treated, you know, in that reference, not in a reference that as a lower rank university should be treated but obviously I was not given that kind of consideration. *And later they said that you start paying your instalments first and then we'll review it and we'll get back to you.*

[17] In an undated letter sent by the first appellant to Jabatan Peguam Negara, Malaysia, the first appellant complained, inter alia, about being disappointed with false promises. The first appellant's undated letter is set out below:

Jabatan Peguam Negara, Malaysia

Cawangan Wilayah Persekutuan,

Tingkat 15-17, Bangunan Bank Rakyat,

Jalan Tangsi

50512 Kuala Lumpur.

Ref: PN/WKL/JPA(P)/KO/14/1553/10(3)

Attn: Pn. Fazilah Bte. Mansor

Notice of Repayment of Student loan – MUSTAFA BIN TASADUK (I/C: A3870647)

In reference to the above, I have come to the attention of the letter send on 17th June 2012 for the full repayment above the above student loan.

From our phone conversation on Thursday 30th June 2011, I have mentioned to your goodself that I and my batch of AUSMAT 11 students were disappointed with a lot of false promises. (Total convertible loan/scholarship value was RM180,000).

Reasons

1. Before we flew to Australia for our undergraduate studies, we were informed that our convertible loan scholarships would depend on our results. If we get results based on number of A's or Degree with Honours/Merit, we will be rewarded with discounted loan value or with Honours/Merit it will be converted to full scholarship.

2. When we returned in Year 2000, I had submitted my results and was informed that I should be able to get full scholarship as I achieved to get my Double Major Degree in Accounting & Finance at University of New South Wales with Merit results (Top 10 in my batch).

3. Thus, after a couple of months, I received my first instalment payment slip that I need to repay RM80,000 within 25 years. When I visited the JPA office, *they mentioned that they will try to seek the full scholarship but at the moment please start repaying the monthly instalments*. At that point, I agreed with their reasons and started repaying.

4. Later after a few years, they changed the value from RM80,000 to the full amount of RM180,000. I was shocked and paid a visit again to JPA office. The new officer told me that she will look into it and investigate the matter but I did not receive any feedback after several checks.

I seek JPA's kind c onsider ation on this reasons and negotiate a final discounted amount (50% of this current value RM133,100.81 ie RM66,600). I will immediately pay RM30,000 as immediate instalment and the balance (RM36,600) in instalment over the next 5 years as full settlement.

Please kindly consider my request on this matter. Your kind reply would be very much appreciated in the earliest possible time.

Thanks.

Yours Sincerely,

-sgd-

Mustafa Bin Tasaduk

(Emphasis added.)

[18] Thus, even based on the first appellant's testimony and letter, there was actually no concluded agreement or commitment to convert his education loan to a scholarship. From the first appellant's own letter, the RM30,000 was in fact part of a payment proposal made by the first appellant himself.

[19] On 26 September 2011, the Jabatan Perkhidmatan Awam Malaysia wrote to the first appellant stating as follows:

JABATAN PERKHIDMATAN AWAM MALAYSIA
BAHAGIAN PEMBANGUNAN MODAL INSAN
Aras 3-6, Blok C1, Kompleks C,
Pusat Pentadbiran Kerajaan Persekutuan
62510 W.P.PUTRAJAYA
MALAYSIA
Tel. : 03-8885 3000
Faks: 03-8889 2176
Web : *http://www.jpa.gov.my*

MUSTAFA BIN TASADUK	Tarikh: 26-09-2011
NO 88 LORONG TAMARI ND,	Rujukan Kami: JPA(L) A3870647
TAMAN SELATAN	UNIVERSITY OF NEW SOUTH
41200 KLANG	WALES, AUSTRALIA
SELANGOR.	Ijazah Pertama

Tuan,

TUNTUTAN BAYARAN BALIK PINJAMAN PELAJARAN JPA

Dengan hormatnya saya diarah merujuk kepada perkara di atas.

> Dimaklumkan bahawa Jabatan ini tidak dapat mempertimbangkan permohonan tuan bagi menukar status pinjaman kepda biasiswa. Dasar yang sedia ada menetapkan bahawa pelajar-pelajar di bawah Skim Pinjaman Tajaan Jabatan ini dikehendaki membayar semula pinjaman yang telah diterima disepanjang tempoh pengajian.
>
> Bagi pelajar dibawah tajaan Pinjaman Boleh Ubah, Jabatan ini boleh mempertimbangakan pengurangan bayaran balik pinjaman dimana peminjam hanya perlu membayar balik 25% sahaja daripada jumlah pinjaman sebenar tertakluk kepada syarat-syarat yang ditetapkan seperti berikut;
>
> (i) *Mendapat sekurang-kurangnya Ijazah Kepujian Kelas Kedua Bawah atau CGPA 2.75 ke atas atau setaraf dengannya;*

A (ii) *Tamat Dengan Jaya dalam tempoh yang ditetapkan di dalam surat tawaran.*

Sila kemukakan surat rayuan berserta *salinan transkrip Ijazah* dan *Sijil Ijazah* yang telah disahkan bagi Jabatan ini mempertimbangkan pengurangan bayaran balik pinjaman.

B Sekian, terima kasih.

'BERKHIDMAT UNTUK NEGARA'

Saya yang menurut perintah,

(RUSNA BINTI YAHAYA)

C Unit Pengurusan Bayaran Balik

Bahagian Pembangunan Modal Insan

b.p. Ketua Pengarah Perkhidmatan Awam

MALAYSIA

D

[20] There was, however, no reply to this letter from the Jabatan Perkhidmatan Awam Malaysia by the first appellant.

E **[21]** Instead, payment of the RM30,000 was made by the first appellant to the respondent. This payment was not accompanied by any covering letter and it was the last payment made by the first appellant towards the educational loan.

F **[22]** The first appellant's testimony in this regard, under cross- examination, was as follows:

MUSTAFA: I was called over to the Auditor General office in KL ...

DPP2: Auditor General? Attorney General?

G MUSTAFA: Attorney General, sorry. Attorney General's office in KL and when I went to see her, it was she but I don't remember her name, *she told me to do this and to make this payment and she would pursue to give me the balance amount as* ... It's when I went to see her, *she had told me that this is the way that you could get a scholarship if you pay the remaining amount*, if you pay 1/3 of the amount. But this was communicated verbally and then she told me to write in and I had written in my

H offer ... I had written in my offer and after that I waited for a reply which I never got. And waited and waited and *I did not receive any reply and then I decided to make a one-off payment assumed that is my final payment to JPA*.

DPP2: Ok, so you mentioned that repayment of 1/3 is communicated verbally, right? *So there's no documentation here today in this Court?*

I MUSTAFA: *Yes, because I had written this letter*.

DPP2: Ok, and you mentioned that *you made payment, which is a final payment?*

MUSTAFA: *Yes, amounted to RM30,000*

DPP2: Ok, and *this was agreed by the Plaintiff?*

MUSTAFA: I submitted my letter with this. *No, I submitted the letter first and waited and then I made this payment, as I didn't get any reply in writing*, I think for more ... months I waited.

DPP2: Ok, *so there was also no agreement or consensus between yourself and Plaintiff that RM30,000 is the final payment?*

MUSTAFA: *Yes, I did not receive any letter* (Emphasis added.)

[23] Suffice to say that even upon the first appellant's testimony, there was no concluded agreement that all the first appellant needed to do was to make a final payment of RM30,000 to be released from further repayments in respect of his educational loan.

[24] The focus of learned counsel for the appellants was more in regard to the two other issues, namely, that the amount owing was not proven and that limitation had set in.

[25] As stated above, the appellants' contention was predicated on the fact that all that was tendered in evidence was a ledger with entries of the amounts released to the first appellant under the educational loan, the payments made and the amount outstanding. The witness who testified did not have any personal knowledge of the payments recorded in the ledger and whether they were actually made or received. Accordingly, learned counsel for the appellants maintained that the sum claimed of RM103,100.81 was not proven.

[26] To this contention, learned counsel for the respondent clarified that the ledger in question was part of an agreed bundle of documents the existence of which were not disputed but their contents were not admitted, commonly known as 'Part B' documents. This was confirmed to be true by learned counsel for the appellants.

[27] No evidence was however adduced, or fact pleaded, by the appellants of what was maintained as the correct amount outstanding instead of the amount claimed or that the educational loan had been fully re-paid. This is bearing in mind the fact that the educational loan granted and released to the first appellant, was not denied.

[28] The decision of the Court of Appeal by Tengku Maimun Tuan Mat JCA (as Her Ladyship then was) in *Ekuiti Setegap Sdn Bhd v Plaza 393 Management Corp (established under The Strata Titles Act 1985)* [2018] 4 MLJ 284 at pp 301–302; [2019] 2 CLJ 592 at pp 609–610, addresses such a situation:

[52] *The plaintiff based its claim on the statements of account. No invoices, debit notes or credit notes were tendered to support the amount in the statements of account.* The learned judge held that the statements of account are sufficient proof of the sums

owed by the defendant and that there is no necessity for the plaintiff to produce the invoices, debit notes and credit notes since the numbers of these invoices and notes are computer-generated and they appear in the plaintiff's statements of account.

[53] *The learned judge alluded to the fact that the statements of account have been agreed to by both parties as part B documents in the CBOD. Thus the authenticity of these documents cannot now be disputed by the defendant. As to the truth of the contents of these documents, other than the agreement (which the defendant is not allowed to rely), the defendant has not disputed the statements of account prior to the filing of this action.* As mentioned earlier, the learned judge made a finding of fact that the defendant had received the statements of account and had never disputed the accuracy of the statements. Thus the learned judge found that it is highly probable that the contents of the statements of account are true and correct.

...

[55] ... It is within the domain of the learned judge whether to accept or to reject the evidence of PW1 and in the instant case Her Ladyship had accepted the evidence of PW1.

[29] Thus, similarly, the existence of the ledger cannot now be disputed by the appellants. What was not admitted were its contents. Although the contents of the ledger were not admitted by the appellants, the ledger itself including its contents were nevertheless, by consent, adduced and admitted into evidence at the trial by the respondent. Accordingly, although not admitted by the appellants as true or correct, there was evidence of the amount owed as stated in the ledger. The evidential burden, as opposed to the legal burden, to demonstrate that the contents of the ledger were wrong or inaccurate was thus shifted to the appellants. However, no evidence was led, or facts pleaded, to the contrary of what was claimed to be the amount owed, as stated in the ledger.

[30] This distinction between what has been termed the legal burden and the evidential burden was clearly pointed by the Court of Appeal in *Randhir Singh a/l Bhajnik Singh v Sunildave Singh Parmar (the administrator of the estate of K Surjit Kaur a/p Gean Kartar Singh, deceased)* [2018] 12 MLJ 166 at p 173; [2018] 1 LNS 1374 at p 9, in which Tengku Maimun Tuan Mat JCA (as Her Ladyship then was) stated as follows:

[8] We have read the appeal records and the able submissions of the parties. After giving much consideration to the submission of the learned counsel for the respondent, we take the view that the appeal must be allowed. Our reasons inter alia are as follows:

(a) *it is trite that legal burden is on the plaintiff and the evidential burden and/or opposing evidence to rebut the plaintiff's claim on the balance of probability lies on the defendant*. In *Pan Malaysian Pools Sdn Bhd v Kwan Tat Thai & Anor and other appeals* [2018] 4 MLJ 461; [2018] 4 CLJ 323, the Court of Appeal observed:

[7] It is well-established as a general rule that 'burden of proof' in a civil

> case is on the plaintiff but the burden will shift when the plaintiff has adduced sufficient evidence of probative value which requires the defendant to rebut the plaintiff's evidence ...
>
> (See *Selvaduray v Chinniah* [1939] 1 MLJ 253).
>
> (Emphasis added.)

[31] In addition, and as an alternative to the foregoing, learned counsel for the appellants maintained that the first appellant's breach in not paying the amount claimed had occurred sometime in May 2012. That was when the respondent's cause of action against the first appellant arose. As this was a claim in contract, it was contended that pursuant to s 6 of the Limitation Act 1953, the claim against the first appellant was barred by the six year limitation period imposed.

[32] The learned sessions court judge however, held that there was a fresh accrual of the limitation period under s 26(2) of the Limitation Act 1953. Section 26(2) provides as follows:

> 26 *Fresh accrual of action on acknowledgment or part payment*
>
> (1) Where there has accrued any right of action to recover land or to enforce a mortgage or charge in respect of land or personal property, and —
>
> (a) the person in possession of the land or personal property acknowledges the title of the person to whom the right of action has accrued; or
>
> (b) in the case of any such action by a mortgagee or chargee the person in possession as aforesaid or the person liable for the debt secured by the mortgage or charge makes any payment in respect thereof, whether principal or interest,
>
> the right shall be deemed to have accrued on and not before the date of the acknowledgment or last payment.
>
> (2) *Where any right of action has accrued to recover any debt or other liquidated pecuniary claim*, or any claim to the personal estate of a deceased person or to any share or interest therein, *and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment*:
>
> Provided that a payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder of the rent or interest then due, but any payment of interest shall have effect, for the purposes of this subsection only, as if it were a payment in respect of the principal debt.

[33] It was pointed out by the learned sessions court judge that the first appellant's CIMB bankers cheque was dated 12 March 2012. The receipt issued by the respondent for this payment was dated 14 March 2012.

[34] It was also pointed out that under cross-examination the first appellant testified as follows:

> DPP2: You mentioned that ... made a payment of RM30,000 in March 2012. Can I know when exactly did you make payment and how did you make payment?
>
> MUSATAFA: I issued a cheque and I send it through my office staff, colleague, as I handed it over.
>
> ...
>
> DPP2: That's the staff officer that you mentioned, right? So, Mr Mohd ... agree with me that Mr Mohd Zahari Affendi made payment of RM30,000 to Kerajaan Malaysia stated in column 1 —
>
> MUSTAFA: No, I made the payment. He just delivered — DPP2 On behalf, I haven't finished my sentence.
>
> MUSTAFA: ... he just went to CIMB Bank to make, issue a bankers draft for me.
>
> ...
>
> DPP2: Yes, so can I refer you to page 28 of Bundle B?
>
> HAKIM: 28, dated of resit asal, ya?
>
> DPP2: Yes, resit asal
>
> MUSTAFA: Page 28?
>
> DPP2: 28, yes. Ok, agree with me that payment of RM30,000 was made to the government of Malaysia, received on the 14th March 2012.
>
> MUSTAFA: Yes.

[35] Upon the evidence led, the learned sessions court judge then concluded that there was a fresh accrual of the prescribed limitation period under s 26 of the Limitation Act 1953 when the first appellant paid the RM30,000 to the respondent.

[36] Accordingly, the learned sessions court judge held that the respondent's claim was not statute barred under the Limitation Act 1953. The claim was brought within six years from payment of the RM30,000, being the last payment made by the first appellant.

[37] Learned counsel for the appellants' contention in regard to limitation was in fact two pronged. Firstly, there cannot be a fresh accrual under s 26(2) if the original limitation period, as was the case here, had not expired. Secondly, the payment of the RM30,000 by the first appellant was neither an acknowledgement of the respondent's claim nor a payment in respect thereof, as required under s 26(2) for there to be a fresh accrual of the respondent's right of action.

[38] As for the first contention, no authority was provided in support of it. The argument proffered appeared to have been predicated on the premise that s 26(2) provides for a 'revival' of the limitation period prescribed. As such, before the limitation period has set in to bar any action, there cannot be any 'revival' of the limitation period.

[39] This argument, with respect, does not accord with the plain words of s 26(2). There is no indication in the words used in s 26(2) that its basis is upon a 'revival' of the limitation period set under s 6.

[40] What s 6 of the Limitation Act does is to bar the bringing of an action after a right of action has accrued for a prescribed period of time.

[41] What s 26(2) introduced, when read with s 6, was in essence a 'fresh accrual' of a right of action. It is from this fresh accrual of a right of action that the limitation period under s 6 is to be reckoned. This is a natural consequence of the words, '... the right shall be deemed to have accrued on and not before the date of the acknowledgement or the last payment': Section 26(2) is not predicated upon any need for the expiry of an existing limitation period before it may be triggered.

[42] Section 26(2) deems that the right of action accrued on the date of acknowledgement or last payment. This then is read with s 6 with the result that the limitation period of six years for a claim in contract, as in this case, will begin to run from the date of acknowledgement or last payment.

[43] As for the second contention, that payment of the RM30,000 was neither an acknowledgment of the respondent's claim nor a payment in respect thereof, the learned sessions court judge found that the payment was an acknowledgement of the debt.

[44] Whether the first appellant's payment of the RM30,000 was an acknowledgment or payment under s 26(2) of the Limitation Act 1953 is necessarily fact sensitive.

[45] Learned counsel for the respondent maintained, which learned counsel for the appellants acknowledged, that the respondent's position was that the payment of RM30,000 made was a 'payment in respect' of the debt owed to the respondent.

[46] Learned counsel for the appellants submitted however, that even such a payment under s 26(2) had to be tantamount to an admission of liability. In support of this contention, learned counsel referred to the case of *Surrendra*

Overseas Ltd v Government of Sri Lanka [1977] 2 All ER 481. In *Surrendra Overseas Ltd*, Kerr J considered s 23(4) of the English Limitation Act 1939 which provided as follows:

> Where any right of action has accrued to recover any debt or other liquidated pecuniary claim ... and the person liable or accountable therefor acknowledges the claim and makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment.

[47] Section 23(4) of the English Limitation Act 1939 was thus in pari materia with s 26(2) of our Limitation Act 1953. In *Surrendra Overseas Ltd*, Kerr J analysed the various decisions and the common law position and concluded at p 491 that:

> In my judgment the 1939 Act has not altered the law in this respect, because the reasoning underlying the exception remains the same. A part payment, like an acknowledgement, must be evidence of an admission of liability for the debt claimed.

[48] It was contended for the appellants that the payment of the RM30,000 was not an unequivocal acknowledgment of the debt owed to the respondent.

[49] However, the oral testimonies of the first appellant referred to above, the contents of the first appellant's undated letter and the payment made of RM30,000 clearly pointed to the fact that the payment was towards repaying the educational loan. The circumstances in which these events occurred pointed to an unequivocal acknowledgement by the first appellant of his liability to repay the debt claimed.

[50] There could be no other probable purpose for the payment of the RM30,000 if not towards settlement of the debt owed to the respondent and there could be no other probable reason for the payment, if it was not an acknowledgement that the debt was owed by the respondent.

CONCLUSION

[51] This case also turned, to a large extent, on findings of fact by the learned sessions court judge. It is well established that in an appellate role, courts are very careful not to interfere with findings of fact by a trial judge at first instance. It is only where it can be established that the learned trial judge was plainly wrong, would findings of fact be interfered with by an appellate court (see *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567; [2003] 1 CLJ 585; *Thomas v Thomas* [1947] AC 484 at p 492; *Yuill v Yuill* [1945] P 15; *Kamdar Sdn Bhd v Bipinchandra a/l Balvantrai & Ors* [2016] MLJU 974; [2017] 1 CLJ 369 and the cases cited by the Court of Appeal in *Sim Cheng Ho v Fum Boo Ju (P) & Anor* [2018] MLJU 1760;

[2018] 1 LNS 1824). This was not established in this appeal.

[52] For the reasons given above, the appeal was dismissed with costs.

Appeal dismissed with costs.

Reported by Izzat Fauzan